ORIGINAL

No. 83-128

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

WILLIAM GOUVEIA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENTS ROBERT E. MILLS AND RICHARD RAYMOND PIERCE IN OPPOSITION TO THE PETITION

CHARLES P. DIAMOND
M. RANDALL OPPENHEIMER
1800 Century Park East
Los Angeles, California 90067
Telephone: (213) 553-6700

Attorneys for Respondent
Robert E. Mills

Of Counsel:
O'MELVENY & MYERS

EDWIN S. SAUL
15760 Ventura Boulevard
Encino, California 91436
Telephone: (213) 995-1521

Attorney for Respondent
Richard Raymond Pierce

QUESTIONS PRESENTED

1. May the government, consistent with the Sixth Amendment guarantee of the right to counsel, isolate an inmate-suspect in administrative segregation solely for purposes of pretrial detention and hold him incommunicado without a lawyer for periods of up to 20 months while it builds a criminal case against him?

not factually correct

2. Did the denial of respondents' right to counsel during their prolonged isolation in administrative detention prejudice their ability to mount a defense, justifying the court of appeals' dismissal of the charges against them?

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STATEMENT OF THE CASE

The United States seeks review of the en banc decision of the court of appeals for the Ninth Circuit in this case. By that decision the court of appeals held that the Sixth Amendment guarantee of counsel requires that an indigent federal inmate suspected of a crime and detained in administrative segregation

beyond the period necessary to ensure the security and good order of the institution is entitled to the appointment of counsel upon proof that his continued isolation is primarily in furtherance of an ongoing criminal investigation and impending indictment. The decision below arises from a prosecution that was initially dismissed on identical grounds by the district court prior to trial only to be reversed by a panel of the court of appeals. Following respondents' convictions, en banc review was granted to reconsider the issues raised by this and another, similar appeal.

1. Thomas Hall was murdered at the Lompoc Correctional Institution in August of 1979. Within hours of the crime, respondents were forceably removed from their unit and subjected to interrogation and examination by FBI agents, prison investigators and a prison physician. When advised of their right to appointed counsel, respondents asked to consult with attorneys, but, as were similar pleas they made repeatedly for the next eight months, their requests were denied. Prison officials then transferred respondents to the prison's Administrative Detention Unit ("ADU"), from which they would not emerge until April 21 of the following year, when they were transported to Los Angeles to plead to a murder indictment that had been returned the previous month (App. C, 42a-44a).*

As evidenced by a detention order prepared on the evening of the murder, the government committed respondents to ADU because they were "pending investigation of a violation of institutional regulations" and were "pending investigation or trial for a criminal act" (ER 121, 122). In a space provided on the printed order for explanation of why respondents' continued

* "App." signifies the Appendices to the Petition; "ER" signifies the Excerpts of Record filed in the court of appeals on September 13, 1982; and "Tr." signifies the transcript in this case.

presence in the general population jeopardized the security of the institution, the prison's Correctional Supervisor made no reference to security concerns other than to note that respondents were "pending investigation" (Id.). The government conceded in the district court that as of the date prison officials completed their investigation (September 13, 1979), the sole reason for respondents' continued detention was the ongoing criminal investigation and impending indictment (App. C, 42a-43a).

Throughout the eight-month commitment in ADU that ensued, respondents were confined to three-by-five foot cells for all but 30 minutes per day and occasional respites in designated areas of the prison's visiting room. They remained virtually isolated from the entire prison population. Although prison officials advised respondents that they eventually would be tried for murder, they prohibited respondents from contacting potential inmate or staff witnesses, discussing their case with anyone other than prison and FBI investigators, or arranging examinations by their own doctors or forensic experts (App. C, 44a).

Pursuant to Bureau of Prison Regulations, in September of 1979 respondents were given prison disciplinary hearings, at which they again requested but were denied appointed counsel. Following those hearings -- which were concluded 22 days after respondents' commitment to ADU -- prison authorities stripped respondents of all of their accrued good time, and the prison's internal investigation and disciplinary proceedings were closed (ER 120).

Nonetheless, with the knowledge of the FBI agents in charge of the criminal investigation, respondents remained in ADU -- ostensibly pursuant to regulations which authorized open-ended detention of "pretrial inmates." See 28 C.F.R. § 541.20(a)(3) & (6)(i) (1982). In the meantime, the FBI and federal

prosecutors pursued criminal proceedings at a leisurely pace. As counsel for the government conceded before the district court, by the time respondents were committed to ADU, the authorities believed they had gathered sufficient inculpatory evidence such that had respondents been at-large on the evening of the murder, the government would have promptly arrested them, taken them before a magistrate and provided them with lawyers (Tr. [July 21, 1980] 49-50; App. C, 46a). Because respondents were already in custody, however, the government did not present its case to a grand jury for another seven months -- four months after it completed its forensic analyses, five months after it secured the cooperation of various inmate witnesses, and six months after it identified and debriefed the prison employees on whose testimony it expected to rely (App. C, 46a).

Respondents were finally arraigned and provided lawyers on April 21, 1980. Because of the belated appointment of counsel and respondents' inability to investigate on their own behalf while in ADU, the district court took an unusually active role in supervising discovery in an attempt to assure fairness in the trial (see Tr. [July 21, 1980] 59-60). In that court's opinion, however, even liberal discovery could not overcome the prejudice resulting from respondents' isolation and lack of representation. On motion of respondents, the district court dismissed the indictments, based on express findings that the respondents' lack of representation while they were held in ADU had unalterably impaired their ability to mount a defense (App. C, 46a-47a, 49a). The district court's finding of prejudice was predicated upon (a) the loss of potential defense witnesses known to respondents only by prison sobriquets whom during respondents' ADU detention the government had transferred to other institutions or released from custody altogether; (b) the loss of testimony of inmates who when first approached by appointed counsel nearly one year after the Hall murder were insufficiently certain of their recollections to run the risk of what they

viewed as certain reprisals by prison officials; (c) the loss of items of potentially exculpatory physical evidence, principally blood-stained clothing, which had deteriorated and which respondents' experts could no longer analyze; (d) the loss of documentary evidence that prison officials had discarded during the nearly one year that respondents went unrepresented; and (e) respondents' inability at the late date counsel were appointed to investigate meaningfully threats made by other inmates on the life of Mr. Hall, circumstances surrounding his placement in protective custody and a prior attempt on his life (ER 80-82; 167-68; 170-79).

As set forth in the government's petition, Judge Gray's dismissal of the indictments was overturned on appeal and the case remanded for trial. Although not particularly relevant to the issues before the Court, the question of respondents' guilt or innocence was hardly as clear-cut as portrayed by the Solicitor General. The forensic evidence, mentioned only in passing by the Solicitor General, itself raised substantial doubt. Thus, FBI and defense criminologists agreed that hair samples extracted from stocking masks admittedly worn by the assailants could not have come from either respondent (Tr. 392-93; 397-400). And, although the government's percipient witnesses and pathologist alike testified that the murder was committed by someone stabbing with his right hand (Tr. 93; 458), the trial evidence unquestionably established respondent Pierce (purportedly the knife-wielding assailant) as left-handed (Tr. 1113-16; 1120-23; 1129).

The government identification testimony was far from conclusive. The prosecution placed considerable reliance on Clifford Wilson, a prison guard who purportedly saw respondent Mills flee from the murder scene. Yet, the government's principal inmate witness testified before the grand jury that

moments after the murder he discovered Guard Wilson asleep at his desk (Tr. 128-29).*

The prosecution's sole eyewitness to the assault itself, inmate Gary Mellon, was contradicted by three other inmates, one called by the government (Tr. 154-55; 992; 1048-50). Each was present at the scene and each testified that the assailants' faces were masked during the murder. Further, Mellon's motives for testifying were suspect. He virtually acknowledged that his cooperation had earned him a release after serving only three years of a 30-year sentence (Tr. 135). Further, Mellon conceded a close relationship with Hall (Tr. 130-31), and other witnesses testified that Mellon had threatened respondent Mills with retribution were he to refuse to intervene on behalf of Hall with an inmate to whom Hall owed a debt (Tr. 1211).

The remainder of the government's case consisted of incredible inmate witness testimony and wholly ambiguous physical evidence. For example, inmate Kurt Ehle -- a self-styled Jewish member of the Aryan Brotherhood -- testified that Mills plotted the Hall murder in his presence. Yet, Ehle conceded that he had arrived at the institution just one week before, was introduced to Mills only after the murder and was literally a complete stranger to Mills at the time of the alleged conversation (Tr. 595). In the same vein, the government relied on the testimony of Butch Wagner who related the substance of incriminating conversations Mills allegedly had with another inmate when all three

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* Further, Mr. Wilson described the individual he observed as mustached; but an FBI report of an interview of Mills conducted on the evening of the murder described him as clean-shaven. And, although Guard Wilson claimed to have made a positive identification of Mills within hours of the murder, later that night he authored a report making no reference to Mills and stating only that he believed he "could positively identify [the fleeing assailant] from five-by-eight picture cards" (Tr. 280).

were in ADU following the Hall murder. But as Wagner admitted, unlike Mills and the third inmate, Wagner was in protective custody in ADU at his own request and therefore was "pretty much off limits" (Tr. 355).*

Although handicapped by their lack of representation during the eight months following the Hall murder, respondents were able to offer the testimony of a number of inmates who, with varying degrees of certainty, placed respondents in the prison dining hall at the time of the crime (e.g., Tr. 756-58; 777-79; 801-04; 819-24; 849-51; 1135-37). Similarly, three inmates who were seated adjacent to the entrance to the murder-scene unit testified that they could recall neither respondent entering or leaving (Tr. 682; 708-09; 728). More compelling, however, was evidence concerning the victim largely pieced together from prison records. Tom Hall was a brash, young inmate active in the prison's drug commerce who experienced recurrent problems getting along with his fellow prisoners (Tr. 165-67; 1097; 1108-09; 1451). Months before the altercation with Mills over a debt (and prior to respondent Pierce's transfer to Lompoc), Hall had been labelled a "snitch" (Tr. 1086; 1109) and unidentified inmates set his cell afire as a warning. Soon thereafter, Hall requested that he be placed in ADU for his own protection (Tr. 1086-88; 1093; 1102-03). Writing to his parents from ADU in April 1979, Hall penned a farewell letter and asked that it be read "at my funeral" (Tr. 1104-05; Exh. 105B).

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* The "substantial amount of physical evidence . . . linking respondents to the murder" (Petition, pp. 10 & 11), consisted principally of stains on respondents' clothing that appeared to be human blood. The only samples that prosecution experts were able to type, however, tended to prove that respondent Mills had his own blood on his clothing -- not that of the victim. Similarly, according to a defense pathologist, a cut on Mills' arm -- which the government contended was inflicted by respondent Pierce as Mills held the victim -- could not have been produced by the murder weapon. The pathologist further testified that reddish finger impressions noted on Pierce's upper arm when he was examined several hours after the murder would have long before faded had they been inflicted during the assault.

3. Following the four-week jury trial in January 1982, respondents were convicted of the Hall murder and related offenses. While respondents' appeals were pending, the court of appeals on its own motion convened en banc to consider the appeals in United States v. Gouveia, apparently for the purpose of reevaluating the panel decision which had reinstated respondents' indictments. On respondents' motion, their appeals were consolidated with those of the Gouveia appellants (App. A, 2a).

The issue as defined by the en banc court of appeals was "whether, under any circumstances, a federal prisoner suspected of committing a crime while in prison and placed in administrative detention is constitutionally entitled to an attorney prior to indictment" (App. A, 2a). In addressing this question, the court proceeded from the premise, established by decisions of this Court, that an indigent accused's right to counsel attaches when "an attorney is necessary to preserve the accused's right to a fair trial or to ensure that the accused will receive effective assistance of counsel at the trial itself" (App. A, 6a). Under this standard, the court reasoned, open-ended detention of an inmate-suspect in ADU compels the appointment of counsel if the inmate is to be assured a fair trial. It noted that "an inmate suspected of crime must overcome investigatory obstacles even greater than those facing the prosecution," including the rapidly changing composition of the prison population and the reluctance of inmates to become involved (App. A, 11a-12a). The court concluded that "early access to the general prison population is critical to the suspect's ability to prepare and preserve a defense," and that prolonged isolation without counsel invariably jeopardizes an inmate's right to a fair trial (App. A, 12a).

The court of appeals next considered the question of whether, consistent with the decisions of this Court, an inmate isolated in ADU should be considered an "accused" for Sixth Amendment purposes and thus constitutionally

entitled to the assistance of counsel. In analyzing this issue, the court carefully defined the nature of ADU detention it was considering. The court noted it was not dealing with detention imposed as a method of discipline, nor with temporary detention "imposed to diffuse a potentially explosive confrontation and to protect inmates from harm" (App. A, 10a). Rather, at issue was administrative detention of "an indeterminate period" imposed because of a "pending [criminal] investigation or trial for a criminal act" where no demonstrable security-related justifications existed apart from the inmate's status as a "suspect" (App. A, 11a).

Noting that "whether a person stands accused can only be determined from the totality of circumstances" (App. A, 8a), the court next observed that pretrial detention of an inmate serves the same objectives that typically prompt an arrest outside the prison walls: "to protect witnesses and evidence, to facilitate an effective investigation, and to prevent further criminal activity by the suspect" (App. A, 11a). However, while "[u]pon arrest a defendant must be arraigned 'without unnecessary delay' . . . [at which] point the accused is guaranteed the assistance of counsel" (App. A, 12a-13a), within the prison walls no such procedural guarantees operate. Because the accused is already in the government's custody, the prosecution can freely suspend his right to counsel indefinitely. The court rejected such unbridled discretion and held that an inmate pretrial detainee, like an arrestee, is entitled to counsel within a reasonable period of time after he is placed or continued in ADU for pretrial detention.

Exercising its supervisory powers, the court of appeals then fashioned a rule that acknowledged an inmate's Sixth Amendment rights yet preserved the government's legitimate prison security interests. The court noted that under Bureau of Prisons regulations, authorities can commit prisoners to ADU pending prison investigations for only thirty days and thereafter cannot confine them in

punitive detention for more than sixty days. See 28 C.F.R. §541.20 (1982). Because isolation beyond this ninety-day period, except for the rarest of circumstances, is only authorized for "pretrial detainees," the court held that the government should allow an indigent inmate confined in ADU for more than 90 days to demonstrate prima facie that his detention is the product of his status as a suspect in a criminal investigation. Once he carries that burden, prison authorities must demonstrate by reference to specific facts apart from his suspect status why the inmate constitutes a security risk, appoint counsel or release him back into the prison population (App. A, 17a).

Applying this standard, the court held that respondents, who had been isolated in ADU without attorneys for periods of up to 20 months solely because they were subjects of criminal investigations, had been denied their Sixth Amendment right to counsel. After reviewing independently the record in the Mills case, the court agreed with the district court's conclusion that, because of their belated appointment, respondents' counsel simply could not provide their clients with the assistance constitutionally required. Although the court flatly rejected the government's contention that respondents' showing of prejudice had been inadequate, it also suggested that in cases such as this one prejudice may be presumed "because ordinarily it will be impossible adequately either to prove or refute its existence" (App. A, 22a). The court found the presumption unnecessary in this case both because of "evidence that 'substantial prejudice' may have occurred" and because of the government's failure to refute respondents' showing of prejudice (App. A, 22a).

REASONS FOR DENYING THE PETITION

This case presents an exceedingly narrow issue concerning the right to counsel under the Sixth Amendment. Contrary to what the Solicitor General

intimates, respondents were committed to ADU not because they threatened the security or good order of the Lompoc penitentiary. Nor were they held in solitary confinement because their continued presence in the general prison population posed a threat to the safety of other inmates. Rather, as the government conceded below and as the district court expressly found, respondents were continued in ADU following a 30-day investigatory period solely because they were the targets of an ongoing criminal investigation and probable criminal indictment (App. C, 43a).

The court of appeals therefore had occasion only to consider a very limited question: whether an indigent inmate held in administrative detention as a suspect in a crime long after any security justification ceases to exist is constitutionally entitled to appointed counsel. In answering this question in favor of the right to counsel, the court of appeals scrupulously adhered to prior decisions of this Court. It properly interpreted Bureau of Prisons regulations. It created no conflict among the circuits. And it fashioned a procedural rule implementing the right to counsel that will have little impact on the administration of the federal prison system other than assuring that inmate-suspects, no less than free citizens arrested because of government suspicion, will receive fair trials.

I. THE EN BANC DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE TEACHINGS OF THIS COURT AS WELL AS DECISIONS OF SISTER CIRCUITS.

A. By its terms, the Sixth Amendment entitles an "accused" in a "criminal prosecution" to the assistance of counsel. In urging a conflict between the decision below and decisions of this Court, the Solicitor General maintains that, for purposes of the Sixth Amendment, only by the initiation of formal,

adversary judicial proceedings marked by the return of an indictment does the government constitute a prison inmate an "accused" subject to a "criminal prosecution," and only then is the inmate entitled to the assistance of a lawyer.

But a majority of this Court has never subscribed to such a narrow, rigid view.* Rather, the Court has consistently held that the right to counsel attaches "whenever necessary to assure a meaningful 'defense.'" United States v. Wade, 388 U.S. 218, 225 (1966). The Court has explained that each pretrial setting which arises for evaluation must be examined individually to determine whether the presence of counsel is necessary to assure fairness at the eventual trial. As the Court wrote in United States v. Ash, 413 U.S. 300, 310-11 (1973):

> "This extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both. In Wade, the Court explained the process of expanding the counsel guarantee to these confrontations:
>
> > 'When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses

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* Kirby v. Illinois, 406 U.S. 682 (1972), on which the Solicitor General principally relies, held only that a per se exclusionary rule does not apply to a post-arrest identification line-up conducted without counsel in the course of "a routine police investigation." Id at 690. The Kirby Court did not have occasion to consider the right to counsel implications of prolonged preindictment confinement such as was the case here, and as the court below noted, "Kirby [was] not a prison case" (App. A, 7a).

against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings. 388 U.S., at 224, 18 L. Ed. 2d 1149 (footnote omitted)."*

The court of appeals quite properly applied the teachings of this Court when it held that a "critical stage" necessarily ensues at some reasonable point after an inmate is committed to ADU for pretrial detention. As this Court has repeatedly recognized, the right to counsel, if it is to have meaning, must be viewed as more than a trial right. See, e.g., Powell v. Alabama, 287 U.S. 45 (1932). Ultimately, it is the right to the assistance of an attorney "at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." United States v. Wade, 388 U.S. at 226. Whether it has attached depends not upon wooden formalities but upon whether "the presence of . . . counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him . . . [and] whether potential substantial prejudice to the defendant's rights inheres in the particular confrontration and the ability of counsel to help avoid that prejudice." Id. at 227.

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* Thus, in order to protect a suspect's Fifth Amendment rights, the Court has held that even though formal, adversary proceedings may not have begun, counsel must be present when an individual "is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way [because] [i]t is at this point that our adversary system of criminal proceedings commences . . . ." Miranda v. Arizona, 384 U.S. 436, 477 (1966) (emphasis added).

This Court also made clear in United States v. Ash, 413 U.S. at 312, that the right to counsel was borne not only out of an accused's need for assistance with the intricacies of procedural and substantive law but also to establish a measure of balance between the forces of the prosecution and those of the defense in "probing for evidence." See also Coleman v. Alabama, 399 U.S. 1, 9 (1970).* Although the Ash Court held that the right to counsel does not ordinarily attach to a prosecutor's trial preparation interviews with witnesses or the display of photographic arrays, it noted that

> "The traditional counterbalance in the American adversary system for these interviews arises from the equal ability of defense counsel to seek and interview witnesses himself.
>
> ". . . No greater limitations are placed on defense counsel in constructing [photo] displays, seeking witnesses, and conducting photographic identifications than those applicable to the prosecution." 413 U.S. at 318.

An inmate-suspect held in ADU without counsel pending indictment and trial is irrevocably deprived of this parity. As the Court said of the similar dilemma faced by an inmate accused of, but untried for, a crime committed outside the prison walls,

> "Confined in a prison . . . [the inmate's] ability to confer with potential defense witnesses, or even keep track of

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* Of the importance of this role played by an attorney, the Court in Coleman stated: "trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial." 399 U.S. at 9.

> their whereabouts, is obviously impaired. And, while 'evidence and witnesses disappear, memories fade, and events lose their perspective,' a man isolated in prison is powerless to exert his own invertigative efforts to mitigate those erosive effects of the passage of time." Smith v. Hooey, 393 U.S. 374, 378 (1969).

By holding respondents here in administrative detention for up to 20 months -- while the population of potential witnesses from which they were isolated was dispersed, while the testimony of potential defense witnesses faded to bare recollection if not rank speculation, and while the probative value of physical evidence was lost -- the government effectively reduced respondents' trial "to a mere formality." United States v. Wade, 388 U.S. at 224.*

Moreover, in determining that respondents' open-ended, pretrial detention constituted a "critical stage," the court of appeals drew a powerful analogy to an arrest outside the prison walls. Under our system of justice, a non-inmate suspect may not, consistent with the Sixth Amendment's right to counsel clause, be deprived of his freedom for an unreasonable period of time without being afforded legal representation. See Coleman v. Alabama, 399 U.S. 1, 15-16 (1970) (Douglas, J., concurring) (contrasting the Russian practice).

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* Noting that the prejudice suffered by an unrepresented inmate-detainee is similar to that of a defendant complaining of undue preindictment delay, the Solicitor General suggests that respondents' remedy lies in the due process clause of the Fifth Amendment. But the same could be said of any Sixth Amendment violation in which counsel's absence or belated appointment prevents the defendant from preparing and presenting an adequate defense. See, e.g., Avery v. Alabama, 308 U.S. 444 (1940). Where the presence of counsel can "help avoid that prejudice," prospective application of the right to counsel -- rather than a retrospective analysis under the due process clause -- is warranted. See Coleman v. Alabama, 399 U.S. 1, 9 (1970).

Outside of prison, however, Sixth Amendment protections are implemented by a series of procedural rules that, upon arrest, unalterably results in a prompt hearing and the appointment of counsel. See Fed. R. Crim. P. 5(a) & (c). As the court of appeals concluded, it would "ignore reality" to view Sixth Amendment rights differently in the prison setting simply because the inmate-suspect does not enjoy similar procedural guarantees (App. A 13a).*

The Solicitor General answers this analogy simply by asserting that it is "incorrect to view administrative detention as in any way accusatory" because the "separation of an inmate . . . serves security purposes" and is not intended "to accuse or to initiate judicial proceedings" (Petition, p. 20). This response misses entirely the point of the court of appeals' decision. As the court below held, "when detention is ordered as a disciplinary measure or to prevent disorder it is indeed a matter of internal prison administration. But when used to isolate an inmate pending trial both its purpose and effect is accusatory" (App. A, 15a). Indeed, in fashioning a rule to give effect to the right to counsel in the prison setting, the court of appeals placed the onus on the inmate to demonstrate that his detention is the result of the pendency of a criminal prosecution. Counsel need not be appointed if the government is able to refute this showing by pointing to legitimate security concerns (App. A, 17a).

The Solicitor General also criticizes the decision below by unfairly ascribing to it the general holding that the right to counsel attaches "whenever a potential defendant lacks investigative resources" (Petition, p.21). But the court

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* Indeed, the government should be no more able to deprive an inmate-detainee of his right to counsel because he is not statutorily entitled to a prompt initial hearing than it can suspend an arrestee's right to counsel by delaying his initial appearance. See United States ex rel. Burton v. Cuyler, 439 F. Supp. 1173, 1181 (E.D. Pa. 1977), aff'd mem., 582 F.2d 1278 (3rd Cir. 1978). Cf. Smith v. United States, 409 U.S. 1066 (1972) (Douglas, J., dissenting from denial of certiorari) (suggesting that Rule 5 applies to an inmate held in administrative detention pending indictment).

of appeals made clear that it was dealing solely with detention tantamount to an arrest. Unlike the unsuspecting target of a secret investigation or the penurious target of an announced investigation, the inmate-suspect held in ADU -- like the arrestee outside the prison walls -- has been the subject of affirmative, accusatory government conduct rendering him unable to make the kind of pretrial investigation that he would otherwise be able to conduct.

Finally, the Solicitor General maintains that there is no basis in Bureau of Prisons' regulations from which to infer that administrative detention beyond 90 days is accusatory and that, in any event, inmates held pending indictment would not be materially benefitted by the appointment of counsel. In fashioning a prophylactic rule to give effect to the right to counsel, the court below correctly construed Bureau of Prisons' regulations when it determined the period beyond which administrative detention presumptively takes on an accusatory cast. Pursuant to 28 C.F.R. § 541.20(a)(1) & (2) (1982), an inmate being investigated for violating prison regulations may be held in ADU for up to 30 days, at which time he is entitled to a hearing before the Institutional Disciplinary Committee ("IDC"). If it adjudges the inmate guilty, the IDC may impose disciplinary confinement which for even the most severe of offenses cannot exceed 60 days. See id. § 541.11(e). Thus, except for inmates completing terms of disciplinary confinement and those "pending transfer," id. § 541.20(a)(4) & (5), continued ADU detention beyond this 90-day period can be imposed only when the inmate is the subject of a "pending investigation or trial for a criminal act," id. § 541.20(a)(3). The court below was therefore fully justified in attaching significance to ADU commitments of greater than 90 days' duration.*

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* The regulations also supposedly require a finding that the inmate's "continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the

(Footnote continued on next page)

The Solicitor General's remaining argument -- that the presence of counsel during prolonged ADU detention is not necessary to assure that the inmate ultimately receives a fair trial -- proceeds from an extremely unrealistic premise. It is indeed true that Bureau of Prisons' regulations provide for assistance by a staff member to interview witnesses and present evidence on behalf of the accused to the IDC. However, as one expert testified at the Mills trial, it is a cardinal principle of survival at a correctional institution such as Lompoc that inmates do not cooperate with prison officials -- whether or not that cooperation would inure to the benefit of a fellow inmate. See Tr. 1441-42. To suggest that a prison guard could effectively replace experienced defense counsel simply ignores the realities of prison life.*

B. Other courts of appeals have had occasion to consider the Sixth Amendment implications of an ADU commitment, and their reasoning fully supports the decision below. Thus, in United States v. Duke, 527 F.2d 386 (5th Cir.), cert. denied, 426 U.S. 952 (1976), the issue was whether imposition of 35

(Footnote continued from previous page)

institution." 28 C.F.R. § 541.20(a) (1982). This additional condition has little meaning for the pretrial detainee for, as we have seen, prison officials construe it as automatically satisfied when the inmate is "pending investigation." See supra, at p. 3.

The Solicitor General also chides the court below for allegedly ignoring 28 C.F.R. § 541.20(a)(6) (1982), which provides that an inmate completing disciplinary confinement can be maintained in ADU for up to 90 additional days when "placement in general population is not prudent" -- after which he must be released to the general population or transferred. This provision seemingly has no bearing on the issue here since the limitation on additional detention is made expressly inapplicable to "pretrial inmates." See id. § 541.20(a)(6)(i). In any event, the court below might well have disregarded it because it considered the "not prudent" standard too vague to provide any assurance that the inmate held beyond the initial 90-day detention period was not being continued in segregation solely as a result of a pending indictment or trial.

* Seeking to minimize the importance of counsel during prolonged periods of detention, the Solicitor General reports that Bureau of Prisons is unaware "of any instances in which retained counsel have sought access to a prison to conduct an investigation prior to indictment" (Petition, p. 28). One may legitimately ask how many federal prisoners have the resources to hire an attorney or, when isolated in ADU, sufficient access to the outside world to locate a lawyer in the first place.

days of segregated confinement triggered the Sixth Amendment right to a speedy trial when the detention was used "as a method of disciplining or investigating inmates who break prison regulations, of protecting certain inmates from members of the general population, and of providing a general cooling-down period for inmates involved in events that could disrupt the general population." Id. 390. The Fifth Circuit answered this question in the negative. However, it made clear that administrative detention is immune from Sixth Amendment consequences only to the extent that it is "in no way related to or dependent on the prosecution by the federal government of an inmate for that same offense as a violation of federal criminal law." Id. (emphasis added). See also United States v. McLemore, 447 F. Supp. 1229, 1235-36 (E.D. Mich. 1978) (placement in administrative detention of an escapee returned to custody pending his indictment and trial triggered the right to a speedy trial because detention was imposed for the purpose of holding the inmate to answer criminal charges).*

Consistent with the rationale of Duke and its progeny, the court of appeals found that respondents' right to counsel attached precisely because their detention not only "related" to a pending criminal prosecution but was the direct consequence of a decision to hold them to answer criminal charges. The decision

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* A similar view was seemingly expressed in United Stated v. Smith, 464 F.2d 194, 196-97 (10th Cir.), cert. denied, 409 U.S. 1066 (1972), where the court rejected a speedy trial claim of inmates confined in administrative detention "for disciplinary reasons, for the protection of the victim, because of their previous harassment of other inmates, and to prevent the possibility of escape." The court held: "Segregated confinement for institutional reasons is not an arrest." Id. at 197 (emphasis added). Speedy trial claims were also rejected in United States v. Mills, 704 F.2d 1553, 1556 (11th Cir. 1983), where the confinement was for "disciplinary segregation," and in United States v. Manetta, 551 F.2d 1352, 1354 (5th Cir. 1977) where, the court noted, administrative detention was imposed for reasons not appreciably different than in Duke. The only decision conceivably intimating a contrary view is United States v. Blevins, 593 F.2d 646 (5th Cir. 1979), where the defendant claimed he was "placed in administrative segregation pending institution of criminal proceedings." The decision is unclear, however. as to whether prison authorities had independent reasons for imposing the detention. See id. at 647 n.3.

below thus does not stand alone but is the logical extension of virtually every other court of appeals decision considering the Sixth Amendment implications of administrative detention.

C. The rule fashioned by the court of appeals will have little appreciable impact on the administration of the federal prison system. Indeed, we understand that following the August 14, 1980 dismissal of the indictments in this case by the district court, Bureau of Prisons officials at Lompoc initiated the practice of delivering right to counsel admonitions to inmates held in ADU during the pendency of investigations by the FBI and U.S. Attorneys office, and arranged to provide public defenders for those inmates wishing the assistance of counsel. Having had practical experience with these procedures, it is telling that the government in its petition voices only conjecture when it speaks of the interference with prison administration and security that it claims will result from the decision below.*

The Solicitor General also paints a dire picture of the dilemma that it claims will confront prison officials who are unwilling to permit a dangerous inmate-suspect to return to the general population yet who are precluded from transferring that inmate to a more secure institution. That picture is illusory. In the first place, the decision below does not deal with prison transfers and nothing in it even arguably suggests a limitation on the discretion of prison authorities to transfer an inmate from one institution to another. The Solicitor General's contrary conclusion stems from the fact that a transfer "presumably would interfere with [an inmate's] ability to investigate or prepare a defense even more than a continuation of administrative detention" (Petition, p. 27 n.25). But it was not only the impact of an ADU commitment on a prisoner's ability to

* Based on a similar admonition given in a case now pending indictment against an inmate recently transferred to Lompoc from the Marion penitentiary, we suspect that this practice has been reinstated and expanded nationwide.

mount a defense that led the court below to fashion the rule that it did. Additionally, the court of appeals deemed the commitments accusatory because of their purpose -- to isolate and hold the inmate pending indictment and trial in the absence of any threat to the security of the institution. We do not question, nor did the court below, the discretion of prison authorities appropriately to transfer an inmate to a more secure or closely controlled institution once he has been adjudged guilty of a breach of prison rules -- be the violation a crime or otherwise.*

For much the same reason, the court of appeals' decision will not limit a warden's authority to confine a dangerous inmate in ADU when transfer is not a viable alternative. As we noted before, the court of appeals held the right to counsel applicable only when an inmate "make[s] a prima facie showing that one of the reasons for continued detention is the investigation of a felony" and only when the government is unable to "refute the inmate's showing" (App. A, 17a). On the other hand, counsel need not be appointed when articulable facts exist to demonstrate that a particular inmate presents a danger to himself, other inmates or the security of the institution, because confinement under such circumstances will be unrelated to the pending prosecution. And even in those rare instances when the government is unable to justify its security concerns, the result will not be the release of a dangerous inmate into the prison population but simply the appointment of a lawyer.

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* Further, it is unlikely that the court of appeals would consider a transfer accusatory because, unlike administrative detention, relocation of an inmate to another institution does not consitute "a 'substantial deprivation of liberty' " (App. A, 9a). For as this Court has held, while a protected liberty interest inheres in remaining free of administrative detention and in the general prison population, an inmate has no protected interest in remaining at a particular institution. Compare Hewitt v. Helms, No. 81-368 (Feb. 22, 1983) (administrative detention), with, e.g., Olim v. Wakinekona, No. 81-1581 (Apr. 26, 1983) (transfer). In any event, because the court of appeals has yet to rule on the question, this is not the appropriate case in which to consider it. See Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955).

Finally, is it simply irresponsible for the Solicitor General to claim that the decision below will result automatically in the dismissal of over 200 pending prosecutions of inmates charged with serious institution crimes. To the extent that the decision below is held applicable to prosecutions pending at the time it was rendered, the Solicitor General's number must be reduced to account for those inmates not indigent, not requesting attorneys, not unrepresented, not held for pretrial detention purposes, not held in ADU for over 90 days, or not prejudiced by their ADU detention.

II. CONSISTENT WITH DECISIONS OF THIS COURT, THE COURT OF APPEALS' DISMISSAL OF THE INDICTMENTS WAS PREDICATED UPON A FINDING OF ACTUAL PREJUDICE, AND ANY IMPLIED PRESUMPTION OF PREJUDICE WAS DICTUM NOT APPROPRIATE FOR REVIEW BY THIS COURT.

The Solicitor General maintains that dismissal of the charges against respondents was unwarranted in the absence of any specific showing of substantial prejudice. But both lower courts found precisely such prejudice. After a searching review of the record compiled after the defense had completed its trial preparations, the district court concluded that the belated appointment of counsel had irrevocably deprived respondents of a meaningful opportunity to answer charges against them. In its order of dismissal the district court made specific reference to

> "the dimming of memories of witnesses who could have substantiated [defendants'] alibi; . . . the irrevocable loss of inmate witnesses known to the defendants only by prison 'nicknames' now long-since transferred to other institutions or released from custody altogether; and . . . the deterioration of physical evidence essential to

corroborate the defendants' testimony and to rebut the evidence against them" (App. C, 47a).

After the careful and independent review of the record reflected in the language of the decision below, the court of appeals agreed: "The record convinces us that preindictment isolation without the assistance of counsel unconstitutionally obstructed the ability of appellants to defend themselves at trial" (App. A, 23a). Under the standard established by this Court in United States v. Morrison, 449 U.S. 361, 365 (1981) -- "demonstrable prejudice, or substantial threat thereof" -- the court of appeals justifiably dismissed the indictments against respondents. The Solicitor General's challenge to the factual underpinnings of the dismissal is wholly without merit and certainly inadequate to disturb this Court's normal rule not to grant certiorari simply "to review evidence and discuss specific facts." Ferguson v. Moore - McCormack Lines, 352 U.S. 521, 537 (1957).

What the Solicitor General seems more concerned with is a statement of the court of appeals that when assessing claims of prejudice to an inmate who has been isolated without a lawyer during a prolonged preindictment period, "[w]e must tip the scales in favor of the locked away accused in order to provide substance to the Sixth Amendment right to counsel" (App. A, 22a). This language, according to the Solicitor General, creates a "virtually irrebuttable presumption [of] prejudice" at odds with Morrison (Petition, p. 15).

But the court below created no such presumption. Rather, acknowledging the difficulties that inhere in the defense of a prison case, it merely cautioned that the courts must be sensitive to claims of actual prejudice because conclusive and irrebuttable proof of prejudice will rarely be available. In any event, that it found actual substantial prejudice in this case renders the Solicitor General's argument academic since this Court does not accept cases simply to review dicta. See Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955).*

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* The court's admonition is wholly consistent with Morrison which counsels that courts must be "responsive to proved claims that governmental conduct has rendered counsel's assistance to the defendant ineffective," and that dismissal is appropriate where there is a "substantial threat" that the defendant was prejudiced by the Sixth Amendment violation. 449 U.S. at 364, 365.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES P. DIAMOND
M. RANDALL OPPENHEIMER

Of Counsel:
O'MELVENY & MYERS

Attorneys for Respondent
Robert E. Mills

EDWIN S. SAUL

Attorney of Respondent
Richard Raymond Pierce

September 1983

CERTIFICATE OF SERVICE

I, CHARLES P. DIAMOND, a member of the Bar of this Court, hereby certify that on September 22, 1983 Respondents' Brief In Opposition was served upon counsel listed below by depositing copies in the United States mail, with first-class postage prepared, addressed as follows:

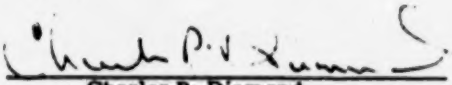
Solicitor General
Department of Justice
Washington, D.C. 20530

Manuel Araujo, Esquire
453 South Spring Street, Suite 1017
Los Angeles, California 90013

Joel Levine, Esquire
Stilz, Boy, Levine & Handzlik
Two Century Park Plaza, Suite 1200
2049 Century Park East
Los Angeles, California 90067

Michael J. Treman, Esquire
105 E. De La Guerra, Suite 5
Santa Barbara, California 93101

Joseph F. Walsh, Esquire
316 West Second Street, Suite 1200
Los Angeles, California 90012



Charles P. Diamond

ORIGINAL

No. 83-128

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

WILLIAM GOUVEIA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

CHARLES P. DIAMOND
M. RANDALL OPPENHEIMER
1800 Century Park East
Los Angeles, California 90067
Telephone: (213) 553-6700

Attorneys for Respondent
Robert E. Mills

Of Counsel:
O'MELVENY & MYERS

EDWIN S. SAUL
15760 Ventura Boulevard
Encino, California 91436
Telephone: (213) 995-1521

Attorney for Respondent
Richard Raymond Pierce

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondents Robert E. Mills and Richard Raymond Pierce, by their counsel of record, hereby petition this Court for leave to proceed in forma pauperis.

Respondents were represented in the courts below by counsel appointed pursuant to the Criminal Justice Act of 1954, 18 U.S.C. § 3006A, and were therein permitted to proceed in forma pauperis.

Respectfully submitted,

CHARLES P. DIAMOND
M. RANDALL OPPENHEIMER
1800 Century Park East
Los Angeles, California 90067
Telephone: (213) 553-6700

Of Counsel:
O'MELVENY & Myers

Attorneys for Respondent
Robert E. Mills

EDWIN S. SAUL
15760 Ventura Boulevard
Encino, California 91436
Telephone: (213) 995-1421

Attorney for Respondent
Richard Raymond Pierce

September 1983

CERTIFICATE OF SERVICE

I, CHARLES P. DIAMOND, a member of the Bar of this Court, hereby certify that on September 22, 1983, Respondents' Motion for Leave to Proceed In Forma Pauperis was served upon counsel listed below by depositing copies in the United States mail, with first-class postage prepaid, addressed as follows:

Solicitor General
Department of Justice
Washington, D. C. 20530

Manuel Araujo, Esq.
453 South Spring Street, Suite 1017
Los Angeles, California 90013

Joel Levine, Esq.
Stilz, Boyd, Levine & Handzlik
Two Century Plaza, Suite 1200
2049 Century Park East
Los Angeles, California 90067

Michael J. Treman, Esq.
Suite 5
105 East De La Guerra
Santa Barbara, California 93101

Joseph F. Walsh, Esq.
Suite 1200
316 West Second Street
Los Angeles, California 90012

Charles P. Diamond
Attorney for Respondent
Robert E. Mills